ORCHARD CIRCLE SDN BHD v. PENTADBIR TANAH DAERAH HULU LANGAT & ORS

FEDERAL COURT, PUTRAJAYA
VERNON ONG LAM KIAT FCJ
ABDUL RAHMAN SEBLI FCJ
ZABARIAH MOHD YUSOF FCJ
[CIVIL APPEAL NO: 01(f)-63-12-2017(B)]
13 NOVEMBER 2020

LAND LAW: *Acquisition of land – Award – Land Acquisition Act 1960, s. 8(4) – Applicability – Whether Form D issued to compulsorily acquire lands lapsed or declared null and void – Whether acquisition of land could lapse or cease after formal possession had been taken – Whether purposive interpretation of s. 8(4) required as opposed to literal interpretation – Whether ought to be read in holistic fashion with ss. 8(5) & 35 – Doctrine of estoppel and res judicata – Whether applicable*

STATUTORY INTERPRETATION: *Interpretation – Land Acquisition Act 1960, s. 8(4) – Whether purposive interpretation of s. 8(4) required as opposed to literal interpretation – Whether ought to be read in holistic fashion with ss. 8(5) & 35 – Whether strict interpretation would cause grave injustice and absurdity*

The appellant, Orchard Circle Sdn Bhd ('Orchard Circle'), was the registered owner of two parcels of land, namely Lot 8630 and Lot 2630, out of which 9005.08 sqm of Lot 8630 and 10,118.69 sqm of Lot 2630 ('the lands') were acquired by the State Authority. On 10 December 2001, Form D of the Land Acquisition Act 1960 ('LAA') was issued to compulsorily acquire the lands for the purpose of building the Kajang Traffic Dispersal Highway ('SILK Highway'). On 24 December 2002, an inquiry before the Land Administrator was held in respect of the acquisition of 19,123.77 sqm of land on 10 December 2001 ('the first land inquiry'). Orchard Circle was subsequently informed that the award for the acquisition of 19,123.77 sqm of land was a nominal RM1 because a portion of the lands had already been surrendered to the State Authority. Form G and Form H were issued in relation to the first land inquiry ('the first award'). On 30 January 2003, Orchard Circle filed an application for judicial review in the High Court for an order, amongst others, to quash the first award of compensation and alternatively for a declaration that the acquisition of the lands was null and void ('first judicial review application'). In this first judicial review application, Orchard Circle alleged that it was not given a right to be heard at the first land inquiry. On 10 December 2010 (after nine years from the date of Form D and seven years from the date of filing of the first judicial review application), the High Court Judge ('Hinshawati Shariff J') allowed the first judicial review application and ordered a *certiorari* to quash the first award and a *mandamus* to remit the matter back to the land office for a fresh second land inquiry. Hence, on 17 February 2011 to 17 November 2011, an inquiry was conducted by the Land Administrator ('the second land

inquiry'). On 24 April 2012, the Land Administrator in the second land inquiry made the following orders (i) the issue in relation to a lapsed Form D did not arise as his award was but an extension of the first award when the High Court in the first judicial review application ordered for a fresh land inquiry; (ii) 17,284.67 sqm of the lands were surrendered to the State Authority and a nominal compensation of RM1 was awarded for the surrendered portion; and (iii) 1,839.10 sqm of the lands were not surrendered hence RM514, 948 was awarded for this portion ('the second award'). Dissatisfied with the decision of the Land Administrator in the second land inquiry, Orchard Circle filed the second judicial review application on 30 May 2012. Both Orchard Circle and the fifth respondent ('SILK') filed Form N in objection to the second award. In the second judicial review application, the High Court Judge ('Mohd Yazid Mustafa J'), in allowing the second judicial review application, premised his decision mainly on the interpretation of s. 8(4) of the LAA and made the following orders, *inter alia* (i) pursuant to s. 8(4) of the LAA, the validity of Form D was only for a period of two-years from the date of its publication in the *Gazette*. In this case, the second award was handed down nine years after the expiration of Form D and as a result, Form D, Form G and Form H and all proceedings following thereon were quashed; (ii) that Orchard Circle was the lawful proprietor of the lands and was entitled to possession thereof; (iii) dismissing Orchard Circle's alternative prayers for a declaration that there was no surrender of 17,284.67 sqm and (iv) dismissing Orchard Circle's reliefs for, *inter alia*, damages. Dissatisfied with the decision of Mohd Yazid Mustafa J, Orchard Circle appealed against the decision on the refusal to award damages and the respective respondents appealed against the decision allowing the second judicial review application. In a unanimous decision, the Court of Appeal allowed the respondents' appeals and dismissed the appeal by Orchard Circle. Orchard Circle was granted leave to appeal to the Federal Court on the following questions of law (i) whether, pursuant to s. 8(4) of the LAA, a declaration in Form D lapsed and ceased to be of any effect where an award of the Land Administrator was made within the stipulated two-year period but subsequently quashed resulting in a subsequent award made outside the two-year period ('first question'); and (ii) whether issues of *res judicata* and estoppel could clothe a declaration in Form D, which would otherwise lapse and cease to have any effect pursuant to s. 8(4) of the LAA, with legal effect ('second question').

Held (dismissing appeal)

Per Zabariah Mohd Yusof FCJ delivering the judgment of the court:

(1) A literal reading of s. 8(4) of the LAA shows that the said provision only applies (*ie*, Form D shall lapse and cease to be of any effect) if the Land Administrator had not made an award within two-years from the date of Form D. The facts herein showed that the first award was well within the two-year period of Form D. It was, however, unfortunate that the

court took almost seven years to make a determination on the first judicial review application filed by Orchard Circle. Given the factual matrix of the case, it could not be said that the Land Administrator in the second land inquiry had contravened s. 8(4) of the LAA when it made the second award beyond the two year period as stipulated. The second land inquiry was only to substitute the first land inquiry as the issue of the land acquisition and taking possession of the lands and Form D were never declared as null and void by the court. (paras 32 & 33)

(2) The State Authority, upon taking possession and the memorial endorsed in the register document of title after the issuance of Form K, the land shall vest with the State Authority as State land, free from encumbrances. Consequently, s. 8(4) of the LAA does not apply when the acquisition proceedings is completed and the lands are already vested in the State Authority. Section 8(4) of the LAA only applies to cases where proceedings are taken or being taken within the period of two years if the land acquisition had not been completed. To revert the land back to Orchard Circle was absurd in the circumstances because the first judicial review application was decided only after seven years it was filed. By then, the SILK Highway project had been constructed and completed. Thus, it could not be the case that Orchard Circle was still the owner of the land where the Highway had been constructed. (paras 44-46)

(3) Hence, a purposive interpretation of s. 8(4) of the LAA was required as opposed to a literal interpretation because (i) this could lead to an abuse of s. 8(4) of the LAA. Quashing Form D would send the wrong message and create an unhealthy precedent where proprietors of land could seek to invalidate acquisition of land by filing judicial review applications and thereafter delay the proceedings and claim damages; (ii) by invalidating the entire land acquisition proceedings which included the taking of formal possession after completion of the intended purposes of the acquisition would create anomaly where public interest project would vest with private land owners; (iii) upon taking formal possession after the issuance of Form K, an endorsement memorial was registered that the land had been acquired and had vested in the State Authority. Therefore, a new Form D could not be issued to acquire a land which was effectively already State land and neither could the other provisions to acquire the land under the LAA would apply to State land; (iv) the State Authority could not withdraw from the acquisition by virtue of s. 35(1) of the LAA; (v) for a new Form D to be issued, the principles relating to the determination of compensation as stated in the First Schedule LAA would not apply as the land was no longer private land but State land; (vi) if a new Form D was issued, the date would be based on the current date and principles relating to the determination of the market value would be based on the date of the new Form D which was

highly prejudicial to the acquiring authority; (vii) the LAA has to be read in a holistic fashion, in that, s. 8(4) has to be read with ss. 8(5) and 35 of the LAA, with the necessary modifications. The acquisition of the land would not lapse or cease after formal possession had been taken. In light of the foregoing, a strict interpretation of the section would not only cause grave injustice and absurdity, it would also cause great inconvenience. (paras 55 & 56)

(4) Reverting to the first question of law, the way it was framed did not reflect or arise from the facts of the present case and neither did it flow from the decision of the High Court. The Form D in this case had not lapsed and neither did the order of the High Court quash the said Form D. The first land inquiry was within the two-year period from the date stated in Form D. Therefore, Form D was very much alive even until the second land inquiry. Hence, there was no need to answer the first question. (para 58)

(5) Orchard Circle had benefitted from the first judicial review, the effect of which was the quashing of the first award (*certiorari*) and proceeded with a second land inquiry (*mandamus*) of which Orchard Circle had participated. The order for *mandamus* by Hinshawati Shariff J indicated that Form D was still valid. Hence, Orchard Circle was precluded and estopped from challenging the validity of Form D in the second judicial review application. By proceeding with the second land inquiry before the Land Administrator and participating in it, it was to be taken that Orchard Circle elected and accepted that the issue before the Land Administrator then was on the decision and award of compensation and damages only. That was the position taken by Orchard Circle after the first judicial review proceeding, but it was now taking a different stance. Clearly, the doctrine of estoppel applied in this case. (paras 76 & 77)

(6) The issues regarding the validity of the acquisition proceedings and whether Orchard Circle was still the lawful proprietor of the said lands were previously raised in the first judicial review application and it would be an abuse of court process to allow Orchard Circle to renew its challenge on the propriety of the land acquisition proceedings in the second judicial review proceeding. Clearly, these two issues were caught by the doctrine of *res judicata*. (para 81)

(7) The second question as framed did not appear to flow from the facts of this case. The applicability of the doctrine of estoppel and *res judicata* was an election made by Orchard Circle in the conduct of litigation, which was peculiar. There was no issue of Form D lapsing because the original Form D was still valid even during the second land inquiry. The doctrine of estoppel and *res judicata* was not applied to override s. 8(4) of the LAA as there was no contravention of s. 8(4) of the LAA in the

first place because the first award was made within the two-year period. Hence, the second question framed by Orchard Circle was therefore misconceived. It was the conduct of Orchard Circle in not appealing against Hinshawati Shariff J's order which estopped it from raising the issue of Form D/s. 8(4) of the LAA in the second judicial review proceeding. These issues ought to have been raised in the first judicial review application, in which the issues or matter had been decided in finality. Therefore, there was no need to answer the second question as framed. (paras 83-85)

Bahasa Melayu *Headnotes*

Perayu, Orchard Circle Sdn Bhd ('Orchard Circle'), adalah pemilik berdaftar dua bidang tanah, iaitu Lot 8630 dan Lot 2630, dari mana 9005.08 m^2 Lot 8630 dan 10,118.69 m^2 Lot 2630 ('tanah-tanah') diperoleh oleh Pihak Berkuasa Negeri. Pada 10 Disember 2001, Borang D Akta Pengambilan Tanah 1960 ('APT') dikeluarkan untuk memperoleh secara wajib tanah-tanah untuk tujuan membina Lebuhraya Skim Penyuraian Trafik Lingkaran Kajang ('Lebuhraya SILK'). Pada 24 November 2002, satu inkuiri dijalankan di hadapan Pentadbir Tanah berkenaan pemerolehan 19,123.77 m^2 tanah pada 10 Disember 2001 ('inkuiri tanah pertama'). Orchard Circle kemudiannya dimaklumkan bahawa award untuk pemerolehan 19,123.77 m^2 tanah adalah nominal RM1 kerana sebahagian dari tanah-tanah itu telahpun diserahkan kepada Pihak Berkuasa Negeri. Borang G dan H dikeluarkan berhubungan dengan inkuiri tanah pertama ('award pertama'). Pada 30 Januari 2003, Orchard Circle memfailkan permohonan semakan kehakiman di Mahkamah Tinggi untuk satu perintah, antara lain, membatalkan award pampasan pertama dan secara alternatif untuk satu pengisytiharan bahawa pemerolehan tanah-tanah terbatal dan tidak sah ('permohonan semakan kehakiman pertama'). Dalam permohonan semakan kehakiman pertama ini, Orchard Circle mendakwa tidak diberikan hak untuk didengar dalam inkuiri tanah pertama. Pada 10 Disember 2010, (selepas sembilan tahun dari tarikh Borang D dan tujuh tahun dari tarikh pemfailan permohonan semakan kehakiman), Hakim Mahkamah Tinggi ('Hinshawati Shariff H') membenarkan permohonan semakan hakiman pertama dan memerintahkan *certiorari* untuk membatalkan award pertama dan *mandamus* untuk meremitkan perkara itu ke pejabat tanah untuk inkuiri tanah kedua yang baharu. Oleh itu, pada 17 Februari 2011 sehingga 17 November 2011, satu inkuiri telah dijalankan oleh Pentadbir Tanah ('inkuiri tanah kedua'). Pada 24 April 2012, Pentadbir Tanah dalam inkuiri tanah kedua membuat perintah-perintah berikut (i) isu berhubungan keluputan Borang D tidak timbul kerana award yang diberikan hanya lanjutan daripada award pertama apabila Mahkamah Tinggi dalam permohonan semakan kehakiman pertama memerintahkan satu inkuiri tanah yang baharu; (ii) 17,284.67 m^2 tanah diserahkan kepada Pihak Berkuasa Negeri dan satu pampasan nominal RM1 telah diawardkan untuk bahagian yang telah diserahkan; (iii) 1,839.10 m^2 tanah-tanah tidak diserahkan oleh itu

RM514, 948 telah diawardkan untuk bahagian ini ('award kedua'). Tidak puas hati dengan keputusan Pentadbir Tanah dalam inkuiri tanah kedua, Orchard Circle memfailkan permohonan semakan kehakiman kedua pada 30 Mei 2012. Kedua-dua Orchard Circle dan responden kelima ('SILK') memfailkan Borang N untuk membantah award kedua. Dalam permohonan semakan kehakiman kedua, Hakim Mahkamah Tinggi ('Mohd Yazid Mustafa H'), dalam membenarkan permohonan semakan kehakiman kedua, membuat keputusannya atas tafsiran s. 8(4) APT dan membuat perintah-perintah berikut, antara lain (i) menurut s. 8(4) APT, kesahihan Borang D hanya untuk tempoh dua tahun daripada tarikh penerbitan dalam *Warta*. Dalam kes ini, award kedua telah disampaikan sembilan tahun selepas keluputan Borang D dan akibatnya, Borang D, Borang G dan Borang H dan segala prosiding-prosiding berikutan itu dibatalkan; (ii) bahawa Orchard Circle adalah pemilik sah tanah-tanah dan berhak ke atas milikannya (iii) menolak permohonan-permohonan alternatif Orchard Circle untuk pengisytiharan bahawa tiada serahan 17,284.67 m^2 dan (iv) menolak relief-relief Orchard Circle untuk, antara lain, ganti rugi. Tidak puas hati dengan keputusan Mohd Yazid Mustafa H, Orchard Circle merayu terhadap keputusan penolakan award untuk ganti rugi dan responden-responden masing-masing merayu terhadap keputusan yang membenarkan permohonan semakan kehakiman kedua. Dalam keputusan sebulat suara, Mahkamah Rayuan membenarkan rayuan-rayuan responden dan menolak rayuan Orchard Circle. Orchard Circle diberikan kebenaran untuk merayu ke Mahkamah Persekutuan atas soalan-soalan undang-undang berikut (i) sama ada, menurut s. 8(4) APT, satu pengisytiharan Borang D luput dan berhenti mempunyai apa-apa kesan di mana award Pentadbir Tanah dibuat dalam tempoh dua tahun tetapi kemudiannya dibatalkan mengakibatkan satu award dibuat kemudian di luar tempoh dua tahun ('soalan pertama'); dan (ii) sama ada isu-isu *res judicata* dan estoppel boleh memberikan pengisytiharan dalam Borang D, yang sebaliknya akan luput dan berhenti mempunyai kesan bawah s. 8(4) APT, dengan kesan undang-undang ('soalan kedua').

Diputuskan (menolak rayuan)

Oleh Zabariah Mohd Yusof HMP menyampaikan penghakiman mahkamah:

(1) Bacaan harfiah s. 8(4) APT menunjukkan bahawa peruntukan tersebut hanya terpakai (contohnya Borang D akan luput dan berhenti mempunyai kesan) jika Pentadbir Tanah tidak membuat award dalam tempoh dua tahun dari tarikh Borang D. Fakta menunjukkan bahawa award pertama disampaikan dalam tempoh dua tahun dari Borang D. Walau bagaimanapun, adalah malang mahkamah mengambil hampir tujuh tahun untuk membuat penentuan permohonan semakan kehakiman pertama yang difailkan Orchard Circle. Memandangkan matriks kes, tidak boleh dinyatakan bahawa Pentadbir Tanah dalam inkuiri tanah kedua telah melanggar s. 8(4) APT apabila menyampaikan award kedua melampaui tempoh dua tahun yang ditentukan. Inkuiri tanah kedua

hanya untuk menggantikan inkuiri tanah pertama kerana isu pemerolehan tanah dan pengambilan milikan tanah-tanah dan Borang D tidak pernah diisytiharkan sebagai terbatal dan tidak sah oleh mahkamah.

(2) Pihak Berkuasa Negeri, setelah mengambil milikan dan memorial disokong oleh daftar dokumen hak milik selepas pengeluaran Borang K, tanah terletak hak pada Pihak Berkuasa Negeri sebagai tanah negeri, bebas daripada halangan-halangan. Akibatnya, s. 8(4) APT tidak terpakai apabila prosiding pengambilan selesai dan tanah-tanah terletak hak pada Pihak Berkuasa Negeri. Seksyen 8(4) APT hanya terpakai pada kes-kes apabila prosiding-prosiding diambil dalam tempoh dua tahun jika pemerolehan tanah belum selesai. Pengembalian tanah kepada Orchard Circle tidak masuk akal dalam keadaan ini kerana permohonan semakan kehakiman pertama hanya diputuskan tujuh tahun selepas difailkan. Ketika itu, projek Lebuhraya SILK telah pun dibina dan selesai. Oleh itu, tidak boleh dikatakan bahawa Orchard Circle masih pemilik tanah di mana satu lebuhraya telah dibina.

(3) Oleh itu, satu tafsiran bertujuan s. 8(4) APT diperlukan dan bukan satu tafsiran harfiah kerana (i) ini boleh membawa kepada satu penyalahgunaan s. 8(4) APT. Pembatalan Borang D akan menghantar satu mesej yang salah dan mewujudkan duluan yang tidak sihat di mana pemilik-pemilik tanah boleh memohon untuk mentaksahkan pengambilan tanah dengan memfailkan permohonan semakan kehakiman dan kemudiannya melambatkan prosiding-prosiding dan menuntut ganti rugi (ii) dengan mentaksahkan keseluruhan prosiding pengambilan tanah yang termasuk pengambilan milikan rasmi selepas penyelesaian tujuan-tujuan yang dimaksudkan, pengambilan akan mewujudkan anomali di mana projek kepentingan awam akan diletak hak pada pemilik-pemilik tanah persendirian' (iii) setelah mengambil hak milik rasmi selepas pengeluaran Borang K, satu pengendorsan memorial didaftar bahawa tanah telah diperoleh dan diletak hak pada Pihak Berkuasa Negeri. Oleh itu, Borang D yang baharu tidak perlu dikeluarkan untuk mengambil tanah yang secara efektif sudah menjadi tanah negeri dan peruntukan-peruntukan lain untuk memperoleh tanah bawah APT tidak akan terpakai pada tanah negeri; (iv) Pihak Berkuasa Negeri tidak boleh menarik diri daripada pemerolehan menurut s. 35(1) APT; (v) untuk Borang D baharu dikeluarkan, prinsip-prinsip berhubungan dengan penentuan pampasan seperti yang dinyatakan dalam Jadual Pertama APT tidak terpakai kerana tanah bukan lagi tanah persendirian tetapi tanah negeri; (vi) jika Borang D baharu dikeluarkan, tarikh akan berdasarkan tarikh semasa dan prinsip-prinsip berhubungan dengan penentuan nilai pasaran akan berdasarkan tarikh Borang D yang baharu dan ini adalah sangat memprejudiskan pada kuasa yang memperoleh; (vii) APT harus dibaca secara holistik, iaitu, s. 8(4) harus

dibaca dengan ss. 8(5) dan 35 APT, dengan pengubahsuaian yang diperlukan. Pemerolehan tanah tidak akan luput atau berhenti selepas milikan rasmi diambil. Berdasarkan perkara di atas, tafsiran yang ketat bukan hanya akan menyebabkan ketidakadilan yang serius dan tidak munasabah, tetapi akan juga menyebabkan kesulitan yang besar.

(4) Berbalik pada soalan undang-undang pertama, cara soalan itu dirangka tidak mencerminkan atau timbul daripada fakta-fakta kes semasa dan tidak mengalir daripada keputusan Mahkamah Tinggi. Borang D dalam kes ini tidak luput dan perintah Mahkamah Tinggi tidak membatalkan Borang D tersebut. Inkuiri tanah pertama adalah dalam tempoh dua tahun dari tarikh yang dinyatakan dalam Borang D. Oleh itu, Borang D masih hidup sehingga inkuiri tanah kedua. Oleh itu, tiada keperluan untuk menjawab soalan pertama.

(5) Orchard Circle telah mendapat manfaat daripada semakan kehakiman pertama, kesannya adalah pembatalan award pertama (*certiorari*) dan seterusnya dengan inkuiri tanah kedua (*mandamus*) yang diambil bahagian oleh Orchard Circle. Perintah *mandamus* oleh Hinshawati Shariff H menunjukkan bahawa Borang D masih sah. Oleh itu, Orchard Circle dikecualikan dan diestop daripada membantah kesahihan Borang D dalam permohonan semakan kehakiman kedua. Dengan meneruskan inkuiri tanah kedua di hadapan Pentadbir Tanah dan mengambil bahagian dalamnya, boleh dikatakan bahawa Orchard Circle bersetuju dan menerima bahawa isu di hadapan Pentadbir Tanah pada masa itu hanya berkenaan keputusan award pampasan dan ganti rugi sahaja. Itu adalah pendirian yang diambil Orchard Circle selepas prosiding semakan kehakiman yang pertama, tetapi sekarang mengambil pendirian yang lain pula. Jelas sekali doktrin estoppel terpakai dalam kes ini.

(6) Isu-isu berkenaan kesahihan prosiding pengambilan dan sama ada Orchard Circle adalah pemilik sah tanah-tanah tersebut sudah dibangkitkan dalam permohonan semakan kehakiman pertama dan akan menjadi satu penyalahgunaan proses mahkamah untuk membenarkan Orchard Circle memperbaharui pencabarannya terhadap kesesuaian prosiding pengambilan tanah dalam prosiding semakan kehakiman kedua. Jelas sekali, kedua-dua isu ini terjerat dengan doktrin *res judicata*.

(7) Soalan kedua seperti dirangkakan tidak mengalir daripada fakta-fakta kes ini. Kebolehlaksanaan doktrin estoppel dan *res judicata* adalah satu pilihan yang dibuat oleh Orchard Circle dalam menjalankan litigasi, dan ini agak pelik sekali. Tiada isu Borang D luput kerana Borang D asli masih sah semasa inkuiri tanah kedua. Doktrin estoppel dan *res judicata* tidak terpakai untuk mengatasi s. 8(4) APT kerana tiada pelanggaran s. 8(4) atas sebab award pertama dibuat dalam tempoh dua tahun. Oleh itu, rangkaan soalan kedua oleh Orchard Circle satu salah anggap. Tindakan Orchard Circle yang tidak merayu terhadap perintah Hinshawati Shariff H yang telah mengestopkannya daripada

membangkitkan isu Borang D/s. 8(4) APT dalam prosiding semakan kehakiman kedua. Isu-isu ini harus dibangkitkan semasa permohonan semakan kehakiman pertama, di mana isu-isu atau perkara-perkara itu telah diputuskan secara muktamad. Oleh itu, tiada keperluan untuk menjawab soalan kedua seperti yang dirangka.

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd & Ors [1966] 2 All ER 536 ***(refd)***

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2002] 3 CLJ 69 FC ***(refd)***

Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***

Hoystead v. Taxation Commissioner [1926] AC 155 ***(refd)***

Kerajaan Malaysia v. Mat Shuhaimi Shafiei [2018] 3 CLJ 1 FC ***(refd)***

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***

Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor [2015] 3 CLJ 861 FC ***(refd)***

Kok Hoong v. Leong Cheng Kweng Mines Ltd [1964] 1 All ER 300 ***(refd)***

Lai Yoke Ngan & Anor v. Chin Teck Kwee & Anor]1997] 3 CLJ 305 FC ***(refd)***

Mahadeo (D) Through Lrs & Ors v. State of U.P & Ors (Civil Appeal No 1944 of 2013) ***(refd)***

Meng Leng Development Pte Ltd v. JIP Hong Trading Co Pte Ltd [1985] 1 CLJ 20; [1985] CLJ (Rep) 8 PC ***(refd)***

Messrs Delhi Airtech Services Pvt Ltd v. State of UP 2012 AIR 573 ***(refd)***

Nokes v. Donkaster Amalgamated Collieries Ltd [1940] AC 1014 ***(refd)***

Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd & Another Appeal [2004] 2 CLJ 265 FC ***(refd)***

Pemungut Hasil Tanah Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee [1983] 1 LNS 14 FC ***(refd)***

Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Kam Gin Paik & Ors [1986] 1 CLJ 283; [1986] CLJ (Rep) 33 PC ***(refd)***

Pengarah Tanah Dan Galian Negeri Kedah & Anor v. Emico Development Sdn Bhd [2000] 1 CLJ 86 CA ***(refd)***

Public Textiles Bhd v. Lembaga Letrik Negara [1976] 1 LNS 120 FC ***(refd)***

Rhyl Urban District Council v Rhyl Amusements Ltd [1959] 1 WLR 465 ***(refd)***

Satendra Prasad Jain And Others v. State of U.P. And Others AIR 1993 SC 2517 ***(refd)***

Tan Kim Hock Product Centre Sdn Bhd & Anor v. Tan Kim Hock Tong Seng Food Industry Sdn Bhd [2018] 2 CLJ 567 FC ***(refd)***

Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals [2018] 3 CLJ 557 FC ***(refd)***

Tong Lee Hwa & Anor v. Lee Yoke San [1978] 1 LNS 218 FC ***(refd)***

United Hokkien Cemeteries, Penang v. The Board Majlis Perbandaran Pulau Pinang [1979] 1 LNS 122 FC ***(refd)***

Virgin Atlantic Airways Ltd v. Zodiac Seats UK Limited [2013] UKSC 46 ***(refd)***

Legislation referred to:
Federal Constitution, art. 13(2)
Interpretation Acts 1948 and 1967, s. 17A
Land Acquisition Act 1960, ss. 8(1), (4), (5), 12, 22, 23, 35(1), (2), (3), (4), First Schedule

The Land Acquisition Act 1894 [Ind], ss. 4, 11A, 17(1), (4), 48(1)

Other source(s) referred to:
Lord Denning, *The Discipline of Law*, Lexis Nexis Butterworths, Indian Reprint, p 16

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[Editor's note: For the Court of Appeal judgment, please see Sistem Lingkaran Lebuhraya Kajang Sdn Bhd v. Orchard Circle Sdn Bhd & Ors And Other Appeals [2018] 1 CLJ 239 (overruled); For the High Court judgment, please see [2016] 1 LNS 1055 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zabariah Mohd Yusof FCJ:

[1] The appeal by the appellant is against the whole decision of the Court of Appeal dated 21 July 2017 which, *inter alia*:

(i) allowed the respective respondents' appeals (Appeal Nos: B-01(A)-114-04/2016, B-01(A)-121-04/2016 & B-01(A)-122-04/2016) with costs;

(ii) dismissed the appellant's appeal (Appeal No: B-01(A)-131-04/2016) with no order as to costs;

(iii) set aside the High Court order dated 7 March 2016 (save for the order refusing damages);

(iv) held that Form D dated 10 December 2001 is valid; and

(v) directed that all objections with respect to the decision of the land administrator on the issues of compensation and surrender be determined in the pending land reference proceedings.

[2] The appellant was granted leave to appeal to the Federal Court on 4 December 2017 on the following questions of law:

(1) Whether, pursuant to section 8(4) of the Land Acquisition Act 1960, a declaration in Form D lapses and ceases to be of any effect where an award of the Land Administrator is made within the stipulated two year period but subsequently quashed resulting in a subsequent award made outside the two year period;

A (2) Whether issues of *res judicata* and estoppel can clothe a declaration in Form D, which would otherwise lapse and cease to have any effect pursuant to section 8(4) of the Land Acquisition Act 1960, with legal effect.

Background

B **[3]** The appellant (hereinafter referred to as "Orchard Circle") was the registered owner of two parcels of land, namely, Lot 8630 and Lot 2630, both held under Grant 30006, Mukim Kajang District of Selangor, out of which 9005.08 sqm of Lot 8630 and 10,118.69 sqm of Lot 2630 (the lands) were acquired by the State Authority. Hence the State Authority acquired a C total of 19,123.77 sqm of land.

[4] On 10 December 2001, Form D of the Land Acquisition Act 1960 (LAA) was issued to compulsorily acquire the lands for the purpose of building the Kajang Traffic Dispersal Highway (SILK Highway).

D **[5]** On 24 December 2002, an inquiry before the Land Administrator was held in respect of the acquisition of 19,123.77 sqm of land on 10 December 2001 (the first land inquiry). Orchard Circle was subsequently informed that the award for the acquisition of 19,123.77 sqm of land was a nominal RM1. Reason being, that a portion of the lands had already been E surrendered to the State Authority. Form G and Form H dated 24 December 2002 were issued in relation to the first land inquiry (first award).

The First Judicial Review Proceedings

[6] On 30 January 2003, Orchard Circle filed an application for judicial review in the High Court Shah Alam for an order, amongst others, to quash F the first award of compensation and alternatively for a declaration that the acquisition of the lands is null and void (first judicial review application). In this first judicial review application, Orchard Circle alleged that it was not given a right to be heard at the first land inquiry.

G **[7]** On 10 December 2010, (after nine years from the date of Form D, and seven years from the date of filing of the first judicial review application), the learned judge of High Court Shah Alam, Hinshawati Shariff J allowed the first judicial review application and made the following orders:

(i) A *certiorari* to quash the first award; and

H (ii) A *mandamus* to remit the matter back to the land office for a fresh second land inquiry.

[8] Hence, pursuant to the order of the High Court dated 10 December 2010, an inquiry was conducted by the Land Administrator on 17 February 2011 to 17 November 2011 (the second land inquiry). At the second land I inquiry before the Land Administrator, Orchard Circle raised the following issues:

(i) Form D had lapsed because no award was made within two years from the date of Form D (premised on s. 8(4) of the LAA); and

(ii) Orchard Circle did not surrender any portion of the lands to the State Authority.

[9] On 20 April 2012, the Land Administrator in the second land inquiry made the following orders:

(i) the issue in relation to a lapsed Form D did not arise as his award is but an extension of the first award when the High Court on 10 December 2010 in the first judicial review application ordered for a fresh land inquiry;

(ii) 17,284.67 sqm of the lands were surrendered to the State Authority. A nominal compensation of RM1 was awarded for the surrendered portion; and

(iii) 1,839.10 sqm of the lands were not surrendered. Hence RM514,948 was awarded for this portion.

(hereinafter referred to as "the second award")

[10] Dissatisfied with the decision of the Land Administrator in the second land inquiry, Orchard Circle filed the second judicial review application on 30 May 2012.

[11] Both Orchard Circle and the fifth respondent (SILK) filed Form N in objection to the second award on 31 May 2012. The land reference proceedings in Form N filed by both Orchard Circle and SILK against the second award, were consolidated and stayed until the final disposal of the second judicial review application.

The Second Judicial Review Proceedings

[12] In the second judicial review application, the learned High Court Judge, Mohd Yazid Mustafa J, premised his decision mainly on the interpretation of s. 8(4) of the LAA.

[13] His Lordship allowed the second judicial review application and made the following orders:

(i) Pursuant to s. 8(4) of the LAA, the validity of Form D was only for a period of two years from the date of its publication in the *Gazette*. Form D was dated 10 December 2001. Therefore, the land inquiry exercise by the Land Administrator must be completed before the expiry of two years ie, on or before 10 December 2003. In this case, the second award was handed down on 20 April 2012, nine years after the expiration of Form D. As a result, the learned judge quashed Form D dated 10 December 2001, Form G and Form H, both dated 20 April 2012 and all proceedings following thereon. The learned judge adopted and follow

A the decision of the Court of Appeal in *Pengarah Tanah Dan Galian Negeri Kedah & Anor v. Emico Development Sdn Bhd* [2000] 1 CLJ 86; [2000] 1 MLJ 257 (*Emico*) which according to him, is binding.

(ii) The court was of the view that the issue as to whether the portions of land which are to be acquired or had been surrendered is to be
B determined by the Collector.

(iii) A declaration that:

(a) the acquisition or taking into possession of the lands by the respondents was null and void and of no legal effect; and
C

(b) Orchard Circle was the lawful proprietor of the lands and was entitled to possession thereof.

(iv) A re-inquiry of the acquisition of the lands was ordered and after re-issuance of a new Form D;

D (v) The court dismissed Orchard Circle's alternative prayers for:

(a) a declaration that there was no surrender of 17,284.67 sqm of the lands; and

(b) an order of *mandamus* to direct the first and/or the second
E respondents to make an award of compensation for the entire lands acquired in the sum of RM17,774,664 with interests thereon from 20 December 2001 until full payment.

(vi) The court also dismissed Orchard Circle's reliefs for the following:

F (a) damages and/or punitive, aggravated and/or exemplary damages to be paid to Orchard Circle by the respondents; and

(b) an inquiry and/or an assessment of damages and/or punitive, aggravated and/or exemplary damages to be paid to Orchard Circle by the respondents.

G **[14]** Dissatisfied with the decision of Mohd Yazid Mustafa J:

(i) Orchard Circle appealed against the decision on the refusal to award damages (Appeal No: B-01(A)-131-04/2016); and

(ii) The respective respondents appealed against the decision of the High
H Court Judge in allowing the second judicial review application, namely:

(a) Appeal No: B-01(A)-114-04/2016 was the appeal by SILK;

(b) Appeal No: B-01(A)-121-04/2016 was the appeal by Pentadbir Tanah Daerah Ulu Langat & Kerajaan Selangor; and

I (c) Appeal No: B-01(A)-122-04/2016 was the appeal by Pengarah Jabatan Ketua Pengarah Tanah dan Galian (Persekutuan) & Kerajaan Negeri Selangor.

Proceedings At The Court Of Appeal

[15] In a unanimous decision, the Court of Appeal allowed the respondents' appeals and dismissed the appeal by Orchard Circle. The Court of Appeal stated that the issues that needed to be determined were:

(i) whether the learned judge, Mohd Yazid Mustafa J was correct in finding that the Land Administrator's decision in respect of the second land inquiry contravened s. 8(4) LAA; and

(ii) whether the learned judge was correct in not awarding damages to Orchard Circle.

[16] In allowing the appeal by the respondents and dismissing the appeal by Orchard Circle, the Court of Appeal premised its decision on the following grounds:

(i) The learned judge in the High Court, Mohd Yazid Mustafa J did not decide on the first judicial review application which was filed on 30 January 2003 and a decision handed down on 10 December 2010. The first judicial review application was decided by Hinshawati Shariff J. In allowing the first judicial review application, Hinshawati Shariff J premised primarily on the complaint by Orchard Circle that it was not given the right to be heard, thus breaching the principle of natural justice. Hence Her Ladyship quashed the first award and made a consequential order that a fresh land inquiry be held before another Land Administrator. Orchard Circle did not appeal against the decision of the first judicial review application when Hinshawati Shariff J did not declare the acquisition as null and void, but participated in the second land inquiry which was conducted pursuant to the Form D issued on 10 December 2001. Consequently, the principle of estoppel applies to Orchard Circle due to its conduct in failing to appeal against the decision of the first judicial review application and by the High Court in refusing to declare the acquisition of the lands as void. This issue has thus become *res judicata*. It would not be just and equitable to allow Orchard Circle to ventilate on the issue of a lapsed Form D now. Hence the original Form D is valid.

(ii) The emphasis of s. 8(4) LAA is to ensure that the Land Administrator performs his or her duty expeditiously. In the present case, s. 8(4) of the LAA was complied with when the first award was handed down by the Land Administrator on 24 December 2002 which was well within the two years period from Form D dated 10 December 2001. Although Orchard Circle filed a judicial review application on the decision of the first land inquiry by the Land Administrator, the litigants took more than two years to pursue the matter in court. The purpose intended in s. 8(4) of the LAA would be defeated if a strict interpretation was adopted since the Land Administrator has no control over the legal challenges mounted by the litigants.

(iii) *Emico*'s case which was relied upon by the learned High Court Judge, Mohd Yazid Mustafa J can be distinguished on its facts from our present case.

(iv) All objections concerning compensation and issue of surrender be dealt with at the land reference proceedings filed at Shah Alam High Court Land Reference No: 15-99-09/2012 and No: 15-100-09/2012.

Submission By Orchard Circle

[17] Mohd Yazid Mustafa J gave effect to the provision and held that Form D was quashed and hence the second award had no legal effect.

[18] Counsel for Orchard Circle submitted that s. 8(4) of the LAA provides a statutory safeguard for the protection of the landowner to ensure that he/she receives not just compensation but adequate compensation guaranteed under art. 13(2) of the Federal Constitution. If Form D is not quashed, the landowners will not receive adequate compensation as the compensation would be based on the market value of the acquired land as at the original date of the *Gazette* in 2001 thus defeating the constitutional guarantee of adequate compensation.

[19] It was submitted that the Court of Appeal's reliance on the first award is erroneous as the effect of quashing an order *vide* the first High Court decision was to invalidate the decision and deprive it of legal effect since its inception. It is as though the decision was never made. The first award is therefore irrelevant since it was subsequently quashed resulting in there being no award at all in law.

[20] On the issue of *res judicata* and estoppel, counsel for Orchard Circle submitted that a statutory provision like s. 8(4) cannot be defeated or overridden by estoppel or *res judicata*. Counsel placed reliance on the Privy Council decision in *Pemungut Hasil Tanah, Daerah Barat Daya, Penang v. Kam Gin Paik & Ors* [1986] 1 CLJ 283; [1986] CLJ (Rep) 33 whereby the Privy Council observed that the delay of seven years between the *Gazette* notification and the appellant's notice of inquiry on 22 March 1979 had the effect that the latter was given, in contravention of the statutory requirements and did not constitute a valid exercise of power. Counsel for the appellant could argue that the respondents not having taken any steps to prevent an inquiry being held, but on the contrary having allowed it to proceed to the stage of an award, were not now entitled to have the proceedings set aside. It sought to distinguish *Pemungut Hasil Tanah Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* [1983] 1 LNS 14; [1983] 2 MLJ 35, on the ground that there the landowner objected, *albeit* ineffectually, to the holding of the inquiry. However, their Lordships rejected this argument and said that "… the failure to object *ab ante* (ie, in advance of or before hand) to an illegal proceeding cannot convert it into a legal one".

Submission By SILK

[21] The first award by the Land Administrator was made within the two years period after Form D dated 10 December 2001 was issued as prescribed under s. 8(4) of the LAA *albeit* was subsequently quashed seven years later at the behest of the application for the second judicial review by Orchard Circle.

[22] Section 8(4) has to be read with ss. 8(5) and 35 of the LAA and with the necessary modifications, namely an acquisition of any land will not lapse or cease after possession has taken place. The lands in question have already been taken formal possession of on 20 February 2003 and SILK Highway had already been completed on 11 June 2004. The highway has been operating since then. The LAA has no provision that permits a reversal of the acquisition as the land has already been vested in the State Authority.

[23] Section 8(4) of the LAA ought to be given a purposive interpretation as a literal meaning would result in absurdity, namely:

(i) it is unprecedented that for a land that has been vested in the State Authority and being used as a highway be reverted back to the previous owner; and

(ii) it is impossible for a fresh *Gazette* of Form D to be issued for the lands because the lands are now State land.

[24] From the facts, estoppel and *res judicata* apply. Although one of the reliefs prayed for was for a declaration that the acquisition was void, Hinshawati Shariff J in the first judicial review application did not make any declaration that the acquisition was null and void and she also did not order that Orchard Circle was entitled to possession. Instead, Her Ladyship only quashed the first award and remitted the matter for a fresh land inquiry before the Land Administrator. The refusal by the learned judge in making an order that the land acquisition was null and void means that the original Form D was still intact. There was no appeal against the said decision by Orchid Circle, instead Orchard Circle proceeded and participated in the second land inquiry. The second land inquiry was therefore premised on the original Form D.

[25] Now Orchard Circle seeks to challenge the validity of the original Form D. This is where Orchard Circle is estopped from challenging the validity of the original Form D.

[26] The Court of Appeal did not err when it exercised its discretion in not allowing Orchard Circle to ventilate the same issue that has already been raised in the first judicial review application because it is not just and equitable to do so. There is no basis for any appellate intervention with the Court of Appeal's exercise of discretion.

[27] *Certiorari* and *mandamus* are discretionary remedies in which relief in public law will be denied if public interests outweigh Orchard Circle's grievance. SILK Highway has been operating since 2004 and serving the needs of the public. If the contention of Orchard Circle is to be adopted, in that Form D was quashed and the whole acquisition is a nullity, it would create an absurd situation and detrimental to public interest as the lands now form the SILK Highway and are being used by public. How is the premise of valuation of the lands to be done? If the original Form D is quashed, and a new one issued, would the valuation be based from the date of the new Form D, given that the lands are no longer in its former physical state and value when it was acquired by the State Authority from Orchard Circle in 2001 when the original Form D was issued?. That cannot be the case.

(The first, second, third and fourth respondents adopted the submission by SILK)

Our Decision

The First Question

[28] The determination of the first question posed hinges on the interpretation of s. 8(4) of the LAA. For clarity, we reproduce the said provision:

> A declaration under subsection (1) *shall lapse and cease to be of any effect on the expiry of two years after the date of its publication in the Gazette* and in so far as it relates to any land or part of any land in respect of which the Land Administrator has not made an award under section 14 (1) within the said period of two years, and, accordingly, *all proceedings already taken or being taken in consequence of such declaration in respect of such land or such part of the land shall terminate and be of no effect*. (emphasis added)

[29] The provision is clear in that a declaration under sub-s. 1 of s. 8 is only effective within two years after the date of its publication in the *Gazette*. As far as the facts of the present case are concerned, the first award was made within the two-year period on 24 December 2002.

[30] However, Orchard Circle alleged that it was never given the right of hearing at the first land inquiry and hence applied for the first judicial review application on 30 January 2003. Unfortunately, the first judicial review application was only determined by the learned High Court Judge, Hinshawati Shariff J on 10 December 2010, which was already beyond the two-year period. Hinshawati Shariff J ordered for:

(a) a *certiorari* quashing the first award; and

(b) a *mandamus* remitting the matter back to the land office for a second land inquiry.

Notably, there was no order by Hinshawati Shariff J quashing the original Form D and neither was there any order declaring that the land acquisition was null and void, although the reliefs for a declaration that the land acquisition was null and void was pleaded as an alternative prayer to the relief of damages and compensation. In other words, from the reading of the order of Hinshawati J, Form D was still maintained.

There was no appeal by Orchard Circle on the order of Hinshawati Shariff J dated 10 December 2010.

[31] Pursuant to the High Court order dated 10 December 2010, the Land Administrator conducted a fresh land inquiry pursuant to s. 12 of the LAA. The order for *mandamus* which still subsisted at that point in time was for the Land Administrator to commence inquiry for compensation within 30 days. It has got nothing to do with s. 8(4) here. By the time Hinshawati Shariff J made the order for a fresh second land inquiry, it was already nine years after the date of Form D.

[32] A literal reading of s. 8(4) of the LAA would show that the said provision only applies (ie, Form D shall lapse and cease to be of any effect) if the Land Administrator has not made an award within two years from the date of Form D. The fact shows that the first award was well within the two-year period of Form D. It is unfortunate that the court through the order of Hinshawati Shariff J took almost seven years to make a determination on the first judicial review application filed by Orchard Circle. Even before the Land Administrator conducted the second land inquiry, it was already beyond the two-year period.

[33] Given the factual matrix of the present case, we are of the view that it cannot be said that the Land Administrator in the second land inquiry had contravened s. 8(4) of the LAA when it made the second award beyond the two-year period as stipulated. The second land inquiry was only to substitute the first land inquiry as the issue of the land acquisition and taking possession of the lands and Form D were never declared as null and void by the court.

[34] In addition, in determining the issue at hand, and given the facts of the present case, apart from referring to s. 8(4) of the LAA, regard must also be given to the other provisions of the LAA and the provision must be read together or in the context of the relevant provisions of the LAA relating to land acquisition proceedings. The relevant provisions of the LAA must be interpreted based on a purposive and literal construction, namely it follows the literal meaning of the Act when that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purpose of the enactment. To read s. 8(4) of the LAA in isolation would lend to an unnatural meaning to that provision. Although it was contended by the appellant's counsel that the words of the said section are clear and unambiguous and thus its plain and natural meaning must be given effect, that in our view may be so if and only if that is the only provision in the said

section. Regard must also be given to the other clauses of the provision in the Act so as not to stray from the true purport and meaning of that section. In this connection, we refer to the Federal Court case of *Kijal Resort Sdn Bhd v. Pentadbir Tanah Kemaman & Anor* [2015] 3 CLJ 861 where it relates to the issue as to when a particular decision was communicated to the appellant and the court held at p. 888:

> [92] In order to determine the issue before us in the present appeal, the words "the date when the decision is first communicated to the applicant" as found in O. 53 r. 3(6) of the RHC 1980 must be read together or in the context of the relevant provisions of the LAA relating to land acquisition proceedings. All those relevant provisions must be interpreted based on "a purposive and literal construction which is one which follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purpose of the enactment.
>
> [93] It is perhaps necessary to refer to some relevant provisions of the LAA and the relevant forms issued relating to land acquisition proceedings under the said Act.

[35] A similar stand was also taken by this court in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 4 CLJ 265; [2018] 2 MLJ 590 when the court held at p. 286 (CLJ); p. 613 (MLJ) said that:

> [56] In interpreting s. 12 of the TUA (Trade Union Act) 1959, an interpretation which meets the purport and design of that provision ought to be considered. It is a cardinal rule of interpretation of statutes that the provisions must be read as a whole. Section 12 of the TUA 1959 consists of three subsections and in our view all the same must be read together and as a whole. To read in isolation sub-s (1) of the same would lead to an unnatural meaning to that provision. It was contended by the appellant's learned counsel that the words of sub-s (1) is clear and unambiguous and thus it's plain natural meaning must be given effect. That in our view may be so if and only if that is the only provision in the said section. Regard must also be given to the other clauses of the provision in order to give the true purport and meaning of that section.

[36] The purpose and intent of Parliament in legislating s. 8(4) of the LAA is to ensure that land proprietors whose lands are compulsorily acquired for public purpose are compensated speedily. The insertion of s. 8(4) of the LAA is in line with the decision of the Federal Court in *Pemungut Hasil Tanah Daerah Barat Daya (Balik Pulau), Pulau Pinang v. Ong Gaik Kee* [1983] 1 LNS 14; [1983] 2 MLJ 35.

[37] Together with this purpose, Parliament had also amended the First Schedule to the LAA by inserting sub-para. 1A so that in determining the market value of the scheduled land, consideration is given to the last transaction on the scheduled land within two years from the date with reference to which the scheduled land is assessed.

[38] Section 8(5) of the LAA provides that where a declaration has lapsed, ss. 35(2), (3) and (4) of the LAA shall apply. Section 35 provides for compensation to be paid for the damage, if any, done to such land as a result of the intended acquisition, where the Authority withdraws from any intended acquisition. However, there is a rider to this provision, namely s. 35(1) which provides that the State Authority can only withdraw the acquisition of any land of which possession has not taken place. For clarity, we reproduce the relevant provision:

> Withdrawal from acquisition
>
> 35. (1) The State Authority shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.
>
> (1A) A notification in Form LA shall be published in the *Gazette* and all proceedings already taken or being taken in consequence of the declaration in subsection 8(1) in respect of the land shall cease to have effect.
>
> (2) Whenever the State Authority withdraws from any acquisition under subsection (1), the Land Administrator, after notifying the person interested in Form LB, shall:
>
> (a) determine the amount of compensation due for the damage, if any, done to such land by action taken under s. 5 and not already paid for under s. 6, and pay such amount to the person injured;
>
> (b) pay to the persons interested all such costs as shall have been incurred by them by reason or in consequence of the proceedings for acquisition, together with compensation for the damage, if any, which they may have sustained by reason or in consequence of such proceedings; and
>
> (c) prepare and serve on each person interested a notice in Form LC.
>
> (3) The First Schedule shall apply, so far as may be, to the determination of the compensation payable under this section.
>
> (3A) For the purpose of this section, subsection 14(5) shall be applicable if necessary.
>
> (4) The Land Administrator or other registering authority shall make a note of any withdrawal under this section in the manner specified in subsection 9(2).
>
> (5) Notwithstanding anything contained in this section, the State Authority shall reserve the right to forfeit an amount which is sufficient to defray the amount of costs and damages incurred by any person interested and such amount shall be determined by the Land Administrator and shall be deducted from the deposit under paragraph 3(3)(d) in the event of any withdrawal made under this section.

In the present case, the lands have already been formally taken possession of when Form K was issued on 20 February 2003 in accordance with s. 22 of the LAA. The memorial was endorsed in the register document of title after issuance of Form K as evidenced by the search made on the title dated 7 May 2014. Section 23 of the LAA provides that:

> 23. The proper registering authority, upon receipt of the notice in Form K, or the Land Administrator of his own motion after completing Form K, shall, upon the register document of title or other appropriate record in his possession as specified in subsection 9 (2) or (3), make with respect to any scheduled land a memorial:
>
> (a) That **the whole of such land has been acquired and has vested in the State Authority** or, in the case of a parcel of a subdivided building, in the person or corporation on whose behalf the parcel has been acquired; or
>
> (b) That so much of the land as is specified in the last column of the schedule to such Form has been acquired. (emphasis added)

[39] In our present case, not only that the lands have been taken possession of, by the State Authority, it has already been vested in the State Authority. Once the lands are vested with the State Authority, there are no provisions in the LAA to revert the lands back to the owner.

[40] In this regard, it is apposite to refer to the Indian LAA. Section 11A of the Indian LAA is similar to our s. 8(4) of the LAA except that it has an additional proviso and an explanatory note. For convenience, we reproduce s. 11A of the Indian LAA which reads:

> Period within which an award shall be made.
>
> 11A. The Collector shall make an award under s. 11 within a period of two years from the date of the publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse:
>
> Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act, the award shall be made within a period of two years from such commencement.
>
> Explanation - In computing the period of two years referred to in this section, the period during which any action or proceeding to be taken in pursuance of the said declaration is stayed by an order of a court shall be excluded.

[41] The Supreme Court of India had occasion to consider the effect of s. 11A of the Indian LAA in *Satendra Prasad Jain And Others v. State of U.P. And Others* AIR 1993 SC 2517. It involved a notification under s. 4 of the Indian LAA which was issued out on 29 July 1986 to acquire the appellant's land for public purpose and in view of the urgency of the public purpose, s. 17(4) of the LAA was applied. Section 48(1) may also be noted where it

provides that "the Government shall be at liberty to withdraw from acquisition of any land of which possession has not been taken". The petition to challenge the acquisition proceedings by the landowner was dismissed on 19 January 1987. The appeal to the Supreme Court was dismissed on 19 January 1987. The possession of the land was taken on 27 February 1987 and handed to the third respondent. The third respondent subsequently decided not to proceed with the acquisition of the lands due to paucity of funds. This resulted in the appellants therein filing a writ of petition to direct to the respondents by way of writ of *mandamus* to make and publish an award. The respondents being the acquiring authority relied on s. 11A in support of its act. The High Court held that "….by the mere fact that possession had been taken in pursuance of s. 17(1), the necessity of giving an award, as mandated by s. 11A, within a period of two years from the date of publication of the notification under s. 4 could not be dispensed with".

The Supreme Court allowed the appeal and held at p. 2520:

> 14. Ordinarily, the Government can take possession of the land proposed to be acquired only after an award of compensation in respect thereof has been made under section 11. Upon the taking of possession the land vests in the Government, that is to say, the owner of the land loses to the Government the title to it. This is what section 16 states. The provisions of section 11A are intended to benefit the land owner and ensure that the award is made within a period of two years from the date of Section 6 declaration. In the ordinary case, therefore, when the Government fails to make an award within two years of the declaration under s. 6, the land has still not vested in the Government and its title remains with the owner, the acquisition proceedings are still pending and, by virtue of the provisions of section 11A, lapse. When Section 17(1) is applied by reason of urgency, the Government takes possession of the land prior to the making of the award under Section 11 and thereupon the owner is divested of the title to the land which is vested in the Government. Section 17(1) states so in unmistakable terms. Clearly, *Section 11A can have no application to cases of acquisitions under Section 17 because the lands have already vested in the Government and there is no provision in the said Act by which the land statutorily vested in the Government can revert to the owner.*
>
> (emphasis added)

[42] In the case of *Messrs Delhi Airtech Services Pvt Ltd v. State of UP* 2012 AIR 573, the Supreme Court of India also dealt with s. 11A of its LAA. There was a divergence of opinion however which resulted in the matter being referred to the Chief Justice of India for reference to a larger Bench to resolve the divergent views. There has not been any reported decision of the larger Bench however the decision of Swatante Kumar J is illustrative where he said at p. 627:

> 162 ...
>
> (A) I hold and declare that Section 11A of the Act has no application to the acquisition proceedings conducted under the provisions of Section 17 of the Act;

A *Once the acquired land has vested in the Government in terms of Section 16 or 17(1) of the Act, possession of which has already been taken, such land is incapable of being re-vested or reverted to the owners/persons interested therein, for lack of any statutory provision for the same under the Act.* (emphasis added)

[43] In *Mahadeo (D) Through Lrs & Ors v. State of U.P & Ors* (Civil Appeal B No 1944 of 2013) the Supreme Court held that the High Court cannot direct an order for *mandamus* to withdraw from the acquisition. The relevant portion of the judgment reads at p. 1632:

... Clearly, Section 11A can have no application to cases of acquisitions under Section 17 **because the lands have already vested in the Government** C **and there is no provision in the said Act by which the land statutorily vested in the Government can revert to the owner**.

18. Indisputably, land in question was acquired by the State Government for the purpose of expansion of city ie, construction of residential/ commercial building under planned development scheme by the Meerut Development Authority and that major portion of the land has already D been utilised by the Authority. Merely because some land was left at the relevant time, that does not give any right to the authority to send proposal to the Government for release of the land in favour of the land owners. The impugned orders passed by the High Court directing the Authority to press the Resolution are absolutely unwarranted in law.

E (emphasis added)

[44] Hence, given the substantial similarity of the Indian s. 11A of its LAA to our s. 8(4) of the LAA, and the absence of provision in which land which had been vested in the State Authority to be reverted to the landowner, we are of the view that the principles as applied by the Supreme Court in the F aforesaid cases are applicable to our situation. Although the sections in the Indian LAA are not exactly the same as ours, substantially they are similar. Therefore, applying the principle as set in the aforesaid cases to our present case, the State Authority, upon taking possession and the memorial endorsed in the register document of title after the issuance of Form K, the land shall G vest with the State Authority as State land, free from encumbrances.

[45] Consequently, s. 8(4) of the LAA does not apply when the acquisition proceedings is completed and the lands are already vested in the State Authority as in our present case. Section 8(4) of the LAA only applies to cases where proceedings are taken or being taken within the period of two H years if the land acquisition has not been completed.

[46] In any event, to revert the land back to Orchard Circle is absurd in the circumstances because the first judicial review application was decided, only after seven years after it was filed. By then, the SILK Highway project has been constructed and completed. Thus, it cannot be the case that Orchard I Circle is still the owner of the land where the Highway has been constructed (refer to *Mahadeo (D) Through Lrs & Ors v. State of U.P & Ors*).

Interpretation Of Section 8(4) Of The LAA

[47] To advert to the contention of Orchard Circle that s. 8(4) of the LAA ought to be given its literal and natural meaning, that the Form D ought to be quashed as the land inquiry was made beyond the two-year period provided for under the same, is to our mind misconceived of the application of the section to the factual matrix of the present case.

[48] This contention is certainly flawed because, firstly, it ignores the reason as to why the second land inquiry was made beyond the two-year period. After the first judicial review application was filed on 30 January 2003 there was no active pursuit by Orchard Circle to have the application heard within the two-year period of Form D. It was left in abeyance and was only heard and decided on 10 December 2010, seven years later. It was in the interest of Orchard Circle to have it heard as soon as possible, but it was not done. Orchard Circle was the author of its predicament through no fault of the respondents. One cannot also fault the Land Administrator at the second land inquiry as by the time it came to him it was already beyond the two-year period. In fact, it was already seven years after the date of Form D by the time Hinshawati Shariff J delivered her decision on the first judicial review application directing for a fresh land inquiry to be held.

[49] Secondly, such literal and ordinary interpretation of s. 8(4) of the LAA in the context of our present case, would lead to absurdity. Such provision as enacted did not envisage a factual situation as in our present scenario, namely, the setting aside of an award by the Land Administrator some seven years later and that an order by the court for a second land inquiry be conducted on a land which has been vested in the State Authority and the purpose of the land being acquired had achieved its purpose, *vis-à-vis* the completion of the SILK Highway. Such was not the intention of the Legislature and neither was such scenario anticipated by the provision. Therefore, deference must be given to the purposive approach of interpretation of the section.

[50] Statutory recognition has been given to the purposive interpretation of statutes when s. 17A of the Interpretation Acts 1948 and 1967 was inserted *via* Act A996 which reads:

> 17A Regard to be had to the purpose of the Act
>
> In the interpretation of provision of an Act, a construction that would promote the purpose of object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[51] Lord Denning in his book "*The Discipline of Law*, Lexis Nexis Butterworths, Indian Reprint at p. 16, commented on the purposive approach of legislative interpretation:

> The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach' ... In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for the judges to wring their hand and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it - by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.

[52] Viscount Simon LC in *Nokes v. Donkaster Amalgamated Collieries Ltd* [1940] AC 1014, a decision of the House of Lords, wherein His Lordship addressed the situation where at times courts are faced with a choice of interpretations. He said at p. 1022:

> If the choice is between two interpretations the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about the effective result.

[53] This court had adopted the purposive approach in legislative interpretation in various of its judgments, and one such instance is *Tan Kim Hock Product Centre Sdn Bhd & Anor v. Tan Kim Hock Tong Seng Food Industry Sdn Bhd* [2018] 2 CLJ 567; [2018] 2 MLJ 1 where this court held that:

> Section 9(1) of Act 730 merely provides that any person 'may apply to the High Court ...' Supplementing the words '*ex parte*' into the provision would certainly achieve the very purpose for the enactment of the provision and satisfy the mischief which the provision seeks to overcome. It is also in accord with the provisions of s 17A of the Interpretation Acts 1948 and 1967 on the purposive approach of interpretation. To borrow the words of Denning LJ in the *Seafood Court Estates* case, it is to give 'force and life' to the intention of the legislature.

[54] Therefore, distilling from principles as laid out in the aforesaid cases, in construing the true purpose and object of the underlying statute by the Legislature, it is the function of the court to adopt an approach which produces a result that is fair, just and not bordering on absurdity. The approach is one that promotes the purpose and object of the statute concerned, *albeit* that such purpose or object is not expressly set out therein (refer to the Federal Court cases of *Palm Oil Research And Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265; [2005] 3 MLJ 97 at p. 130 [79]; *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd* [2002] 3 CLJ 69; [2002] 2 MLJ 11 at 26E; *United Hokkien Cemeteries, Penang v. The Board Majlis Perbandaran Pulau Pinang* [1979] 1 LNS 122; [1979] 2 MLJ 121 at 123 C-E.

[55] Hence a purposive interpretation of s. 8(4) of the LAA is required as opposed to a literal interpretation because:

(i) This can lead to abuse of s. 8(4) of the LAA. Quashing Form D in our case will send the wrong message and create a precedent which is unhealthy where proprietors of land could seek to invalidate acquisition of land by filing judicial review applications and thereafter delay the proceedings until over and beyond the two years of the acquisition *Gazette* and claim damages.

(ii) In applying for judicial review of the first land inquiry, there was no application for stay of the land acquisition proceedings. By invalidating the entire land acquisition proceedings which include the taking of formal possession after completion of the intended purpose of the acquisition will create anomaly where public interest project will vest with private landowners.

(iii) In this case, upon taking formal possession after the issuance of Form K, an endorsement memorial was registered that the land has been acquired and has vested in the State Authority. Therefore, a new Form D cannot be issued to acquire a land which is effectively already State land and neither could the other provisions to acquire the land under the LAA would apply to State land.

(iv) In land acquisition, for land of which possession has been taken by the State Authority, the State Authority cannot withdraw from the acquisition by virtue of s. 35(1) of the LAA.

(v) For a new Form D to be issued, the principles relating to the determination of compensation as stated in the First Schedule LAA will not apply as the land is no longer private land but State land.

(vi) If a new Form D is issued, the date would be based on the current date and the principles relating to the determination of the market value would be based on the date of the new Form D. This would be highly prejudicial to the acquiring authority as the intended public interest project, namely the SILK Highway has been completed on the land. The value of the land as of the date of the new Form D would certainly be higher than on the date of the first Form D (which was in 2002), by leaps and bounds in view of the time period from 2002 and the presence of the SILK Highway. That is certainly not the mischief s. 8(4) of the LAA was enacted to satisfy.

(vii) The LAA has to be read in a holistic fashion, in that, s. 8(4) has to be read with ss. 8(5) and 35 of the LAA, with the necessary modifications. The acquisition of the land will not lapse or cease after formal possession has been taken.

[56] In light of the foregoing, a strict interpretation of the section would not only cause grave injustice and absurdity, it would also cause great inconvenience.

[57] The Court of Appeal's approach in interpreting s. 8(4) of the LAA is correct, and does not warrant any appellate intervention.

[58] Reverting to the first question, the way it is framed does not reflect or arise from the facts of the present case and neither does it flow from the decision of the High Court dated 10 December 2010. The Form D in our case had not lapsed and neither did the order of the High Court dated 10 December 2010 quash the said Form D. The first land inquiry was within the two-year period from the date stated in Form D. Therefore, Form D was very much alive even until the second land inquiry. Hence, we do not see the need to answer the first question.

[59] In forming his view that s. 8(4) of the LAA is clear and unambiguous where the validity of Form D is only for a period of two years from the date of its publication in the *Gazette*, Mohd Yazid Mustafa J said in his judgment that he adopted the decision of the Court of Appeal case of the *Emico*'s case without really explaining how the aforesaid case is applicable to our present case. His Lordship was of the view that the second land inquiry was "tainted for breach of s. 8(4) of the LAA wherein the Form D which the second inquiry was premised upon had lapsed and has no legal effect". He further said that "the second inquiry has no legal effect and made beyond the scope of the Land Acquisition Act".

[60] The aforesaid reasoning by the learned Mohd Yazid Mustafa J, failed to judicially appreciate the factual matrix of the present case. It is not a straightforward and isolated application of s. 8(4) of the LAA. Hence, the application by the learned judge of the said section to the facts of our present case is flawed.

[61] The facts of *Emico* can be easily distinguished. In *Emico*'s case, the first inquiry and award for compensation was made on 18 October 1995 and was quashed on 3 August 1996. On the same date of 3 August 1996, an order for *mandamus* was issued directing the Land Administrator to conduct a second land inquiry for the purpose of making a fresh award. The second land inquiry was decided by the Land Administrator on 6 August 1997. Since Form D was published on 3 August 1995, the two-year period under s. 8(4) lapsed on 2 August 1997. Clearly, in *Emico*'s case the *mandamus* order by the High Court was within the two-year period but the second award by the Land Administrator in pursuant to the court order dated 3 August 1996 was made after the two-year period had lapsed. Unlike our present case, the first award was within the two-year period. When the first judicial review application was decided by the Hinshawati J in the first judicial review application, the

two-year period had already lapsed. But there was no order invalidating the land acquisition or the original Form D as the order of the Hinshawati Shariff J was only to proceed with a fresh inquiry before the Land Administrator.

The further difference of *Emico*'s case is that, the land was acquired for and on behalf of Permodalan Kedah Bhd, not for public interest but for commercial purpose. Hence the issue of "public interest" does not arise as compared to our present facts where the acquisition was for the construction of a highway, namely the SILK Highway which is already completed and in full operation for public use.

In addition, in *Emico*'s case there was no evidence that the acquiring authority had taken possession of the land and had carried out its intended commercial purpose, unlike the facts in the present case where the lands are already vested in the State Authority and the SILK Highway was already completed and being used by the public. The facts in *Emico* which led to the exposition of the law on s. 8(4) of the LAA is only peculiar to the facts of that case and was never intended to be applied as a general exposition of the law on s. 8(4) of the LAA irrespective of the facts.

The Second Question

[62] The second question deals with the principle of *res judicata* and estoppel. It is whether *res judicata* and estoppel can insulate a declaration in Form D, which would otherwise lapse and cease to have any effect pursuant to s. 8(4) of the LAA, with legal effect.

Estoppel

[63] It was argued by Orchard Circle that estoppel cannot be applied to prevent/evade the operation of a statute. Once there is a contravention of a provision of any statute, the doctrine of estoppel cannot be applied to prevent a person from contending what was done was illegal or void. Orchard Circle relied on *Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals* [2018] 3 CLJ 557 and *Rhyl Urban District Council v Rhyl Amusements Ltd* [1959] 1 WLR 465. We do not dispute the correctness of this contention by Orchard Circle in this respect, however, the exposition of the doctrine to the facts of the case cited cannot be taken out of context.

[64] In *Tenaga Nasional Berhad*'s case, the exposition of the law is that estoppel cannot apply when its effect is to stop a statutory body from enforcing its statutory right, namely to prevent Tenaga Nasional Berhad from collecting its scheduled rates which it was entitled to collect under the Electricity Act 1949. It is in this context that it was said that the Act enacted for the benefit of a section of the public and it is not open to the court to allow the party bound by the statutory obligation to be barred from carrying it out by the operation of an estoppel.

[65] The *Tenaga Nasional Berhad*'s case adopted the proposition of law in *Public Textiles Berhad v. Lembaga Letrik Negara* [1976] 1 LNS 120; [1976] 2 MLJ 58 and *Kok Hoong v. Leong Cheng Kweng Mines Ltd* [1964] 1 All ER 300.

[66] The Federal Court in *Public Textiles Berhad* has set the guidelines to look for, when deciding whether the principle of estoppel applies in a particular case:

> Accordingly in cases of this kind *the first duty of the court is to determine the nature of the obligation imposed by the statute on the parties which prevents the plea of estoppel being raised. If the statute is enacted for the benefit of someone other than the person against whom the estoppel is pleaded, then the doctrine of estoppel is excluded*. Because the statute must be obeyed, it is sometimes called a "positive", or an "imperative" statute. It is not always easy to decide whether a particular statute is laying down a positive duty or a negative one. Hence the issue is one of considerable difficulty, and importance.
>
> (emphasis added)

[67] In the Privy Council case of *Kok Hoong,* it sets down the principle that limits the application of estoppel in cases where statutory provisions are infringed:

> Thus, despite the principle that limits estoppels where statutes are infringed, a litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.

[68] In our present case, s. 8(4) of the LAA was enacted solely for the benefit of the landowners. It is to ensure landowners whose lands are affected by the acquisition are compensated adequately. The section is not meant to protect the public or a certain section of the public. In our present case, the principle of estoppel was not raised to bar a statutory obligation or to deprive any benefit to the public. It is in fact the opposite, namely, the *mandamus* order obtained was to direct the first respondent to conduct the second land inquiry.

[69] The argument by SILK in relation to estoppel is with regard to the act or conduct of Orchard Circle and has nothing to do with estoppel against an *ultra vires* act under a statute. In the first judicial review application, Orchard Circle applied for the following reliefs:

> (1) An Order for *Certiorari* to remove into this ... court and to quash the decision and award of compensation made by the Land Administrator of the District of Ulu Langat on 24 December 2002 for the acquisition of parts of Lots 8630 and 2630 held under Geran No. 30006 in the Mukim of Kajang, District of Ulu Langat, State of Selangor Darul Ehsan;

(2) An Order of *Mandamus* directed to the Land Administrator to make an award of compensation in the sum of RM16,745,970.00 or in accordance with the law and taking into account the Valuation Report dated 2.9.2002 to arrive at a just reward in the circumstances of the case;

(3) Alternatively to paragraph (2) above, that the applicant be granted damages in the sum of RM16,745,970.00 based on the evidence before the Land Administrator namely the Valuation Report dated 2.9.2002;

(4) That alternatively to paragraphs (1), (2) and (3) above the Applicant be granted a Declaration that the acquisition or taking into possession of the Applicant's lands which form parts of Lots 8630 and 2630 held under Geran No. 30006 in the Mukim of Kajang, District of Ulu Langat, State of Selangor Darul Ehsan by the State Authority and/or the Land Administrator of the District of Ulu Langat is null and void and of no effect;

(5) That further to paragraph (d) above the Applicant be granted a Declaration that the Applicant is the lawful proprietor of the said lands and entitled to possession thereof or *in lieu* thereof damages;

(6) That the Applicant be at liberty to apply for all reliefs provided for under Paragraph 1 of Schedule to the Courts of Judicature Act 1964 and Section 25 of the same Act

(7) ...

(8) ...

[70] The first judicial review application was allowed when Hinshawati Shariff J made the following orders:

(1) suatu Perintah *certiorari* yang memindah ke Mahkamah yang mulia ini dan membatalkan keputusan dan award pampasan yang dibuat oleh Responden Pertama pada 24 Disember 2002 untuk pengambilan sebahagian Lot-Lot 8630 dan 2630 yang dipegang di bawah Geran No: 30006 dalam Mukim Kajang, Daerah Ulu Langat, Negeri Selangor Darul Ehsan (Tanah-Tanah tersebut);

(2) suatu Perintah *Mandamus* bahawa perkara ini dikembalikan kepada Responden Pertama untuk menjalankan satu siasatan penuh atas pengambilan Tanah-tanah tersebut di bawah Akta Pengambilan Tanah 1960 di mana siasatan tersebut dikehendaki bermula dalam tempoh masa 30 hari dari tarikh Perintah ini;

(3) satu Perintah pihak-pihak diberi kebenaran untuk memohon berkenaan perlaksanaan terma-terma perintah ini; dan

(4) suatu Perintah bahawa Responden-Responden membayar kos yang ditaksirkan kepada Pemohon.

[71] It is to be observed that despite Orchard Circle praying in its relief for a declaration that the acquisition or taking into possession of the applicant's lands by the State Authority and/or the Land Administrator is null and void and of no effect, in the first judicial review application, Hinshawati

Shariff J did not grant such relief in her order dated 10 December 2010. Neither did she quash Form D. This means Form D and the acquisition and the taking of possession of the land is valid. Orchard Circle did not appeal against this order dated 10 December 2010.

[72] In compliance with this order by the court dated 10 December 2010, the Land Administrator proceeded with the second land inquiry based on the original Form D pursuant to s. 12 of the LAA. Orchard Circle had participated in the second land inquiry.

[73] It was at the second land inquiry that Orchard Circle raised the issue on the Form D which had lapsed because it was beyond the two years from the date of Form D. The election by Orchard Circle not to appeal on the order dated 10 December 2010 to take this course of action and has benefited under or arising out of the course of conduct which they have first pursued and with which their subsequent conduct, is inconsistent with their election. After taking advantage and benefiting from their election, they must be precluded from saying that it is invalid and ask to set it aside.

[74] It was argued by counsel for Orchard Circle that the reason why Orchard Circle did not appeal against the order of Hinshawati Shariff J was that they had succeeded in getting a *certiorari* which means that Form D was quashed. This argument has no leg to stand on because Hinshawati Shariff J did not make any order of declaration that the land acquisition or the taking into possession of the lands was null and void and neither did she quash Form D. Therefore, Orchard Circle should have appealed against the decision of Hinshawati Shariff J if they wish to have Form D quashed and declare the land acquisition void.

[75] On a similar issue, the case of *Meng Leng Development Pte Ltd v. JIP Hong Trading Co Pte Ltd* [1985] 1 CLJ 20; [1985] CLJ (Rep) 8; [1985] 1 MLJ 7 is instructive. There, the relief prayed for was for specific performance. However the learned judge granted damages *in lieu* of specific performance because the property in question was already sold to a third party. The appellants appealed for a reduction of the damages granted to the respondent. However, the respondent enforced the order for damages and obtained the payment for the damages which was awarded by the court. On appeal to the Court of Appeal, the order for specific performance was granted on a cross-appeal which was filed by the respondent after the Court of Appeal pointed out that the right of specific performance is not affected by the act of the sale to third party. On appeal to the Privy Council, it was held that:

> In Spencer, Bower and Turner "*The law relating to Estoppel by Representation*" 3rd Edition (1977), paragraph 310 summarises the doctrine of election as applied to the law of estoppel as follows:
>
> > When A dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealing between which he may make his election, and A so conducts himself as reasonably to induce B to believe that he is intending

> definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting. It is of the essence of election that the party electing shall be "confronted" with two mutually exclusive courses of action between which he must, in fairness to the other party, make his choice.

In the present case the purchaser could not take the damages and obtain specific performance. By demanding and accepting the deposit of the damages the purchaser chose to adopt the order of the trial Judge and relinquished the right to appeal for that order to be set aside and for specific performance to be substituted. The vendor altered its position to its detriment by raising and paying $297,500 on November 12, 1981. The vendor had been deprived of that sum ever since. After the judgment of A.P. Rajah J. the purchaser was indeed confronted with two alternative and mutually exclusive courses of action, namely, to enforce the award of damages or to seek to persuade the Court of Appeal to set aside the award of damages and to substitute the remedy of specific performance.

By procuring the payment of the damages of $297,500 the purchaser accepted the judge's order. If the purchaser had served a notice of appeal seeking specific performance or had informed the vendor that the purchaser intended to seek an order for specific performance from the Court of Appeal, the vendor would have been able to refuse to place the damages on deposit and would have been entitled to renew and to succeed in an application for a stay of execution with regard to the damages pending the hearing of the purchaser's appeal seeking specific performance.

Paragraph 322 of the cited work by Spencer, Bower and Turner relating to election in the conduct of litigation is in these terms:

> Where a litigant has taken the benefit, in whole or in part, of a decision in his favour, he is precluded from setting up in any subsequent proceedings between the same parties, by way of appeal or otherwise, that such decision was erroneous, or, though correct as to the part which was in his favour, was wrongly decided as to the residue.

[76] Similarly, in our present appeal, Orchard Circle had benefited from the first judicial review, the effect of which was the quashing of the first award (*certiorari*) and proceeded with a second land inquiry (*mandamus*) of which Orchard Circle had participated. The order for *mandamus* by Hinshawati Shariff J indicated that Form D was still valid. Hence Orchard Circle is precluded and estopped from challenging the validity of Form D in the second judicial review application. By proceeding with the second land inquiry before the Land Administrator and participating in it, it is to be taken that Orchard Circle elected and accepted that the issue before the Land Administrator then is on the decision and award of compensation and damages only.

[77] That was the position taken by Orchard Circle after the first judicial review proceedings, but is now taking a different stance. Clearly, the doctrine of estoppel applies in this case.

Res Judicata

[78] The issues regarding the validity of the acquisition proceedings and whether Orchard Circle is the rightful proprietor of the said lands were issues before the learned judge in the first judicial review proceedings, premised on the reliefs sought for in the same. The current reliefs sought by Orchard Circle in the second judicial review application are the same reliefs which had been denied by Hinshawati Shariff J in the first judicial review application. Hence the issues have been disposed of in finality by parties then. It would be an abuse of process to allow Orchard Circle to renew its challenge on the propriety of the land acquisition proceedings when it challenged Form D in the second judicial review proceedings. This would amount to a back door appeal against the High Court order dated 10 December 2010 in the first judicial review application.

Peh Swee Chin FCJ in *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783 in delivering the judgment of the court explained the concept of *res judicata* which means that when a matter adjudged, and its significance lies in its effect of creating an estoppel per *rem judicature*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata* as the judgment becomes the truth between the parties. The rationale is that there should be finality in litigation and that no one should be vexed twice for the same cause or issue.

[79] For the doctrine to apply, the same issue must have been raised and decided in an earlier proceeding or action in which the parties are represented. It is not open for the same issue to be litigated afresh between the same parties. Lord Sumption sitting in the Supreme Court in *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Limited* [2013] UKSC 46, described the doctrine as:

> ... a portmanteau term which is used to describe a number of different legal principles with different judicial origins.

[80] The thrust of the doctrine is to prevent a party from re-litigating an issue or a defence which has already been determined (known as cause of action estoppel or issue estoppel) or which could have previously been litigated. The latter principle had been established in the case of *Henderson v. Henderson* 1843 3 Hare 100 (and ensured, as a matter of important public policy, the finality of judgments so as to prevent a party from being vexed twice and a waste of judicial resources. As it is not always easy to identify where one concept begins and another ends, Lord Sumption (in delivering

the unanimous judgment of the Supreme Court) in the *Virgin Atlantic* case gave some clarification to the term with identifying the six principles which make up the doctrine, which are:

(i) a party is prevented from bringing subsequent proceedings to challenge an outcome that has already been decided (cause of action estoppel);

(ii) if a claimant succeeds in the first action and does not appeal the outcome, he may not bring a subsequent action on the same cause of action (ie, to recover further damages);

(iii) the doctrine of merger treats a cause of action as having been extinguished once judgment has been provided and accordingly the claimant's only right is the judgment itself;

(iv) a party may not bring subsequent proceedings on an issue that has already been determined (issue estoppel);

(v) a party may not bring subsequent proceedings which should and could have been dealt with in earlier proceedings (the '*Henderson v. Henderson*' principle);

(vi) There is a general procedural rule against abusive proceedings.

It must also be shown that the earlier judgment necessarily and with precision determined the point in issues to constitute *res judicata*.

(See *Hoystead v. Taxation Commissioner* [1926] AC 155; *Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd & Ors* [1966] 2 All ER 536 at p. 565; *Tong Lee Hwa & Anor v. Lee Yoke San* [1978] 1 LNS 218; [1979] 1 MLJ 24;

[81] Apart from the issue of s. 8(4) of the LAA, the fact remains that the issues regarding the validity of the acquisition proceedings and whether Orchard Circle was still the lawful proprietor of the said lands were previously raised in the first judicial review application and it will be an abuse of court process to allow Orchard Circle to renew its challenge on the propriety of the land acquisition proceeding in the second judicial review proceeding. Clearly, these two issues are caught by the doctrine of *res judicata*. (Refer to *Lai Yoke Ngan & Another v. Chin Teck Kwee & Anor* [1997] 3 CLJ 305; [1997] 2 MLJ 565 and *Kerajaan Malaysia v. Mat Shuhaimi Shafiei* [2018] 3 CLJ 1; [2018] 2 MLJ 133).

[82] Therefore, Orchard Circle is estopped from claiming for an order of *certiorari* to quash Form D now (*Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 at 293 C-F and 294 H-I). The Court of Appeal was correct to have found that it would not be just and equitable to allow Orchard Circle to ventilate on the issue of Form D in the second judicial review application.

[83] The second question as framed, does not appear to flow from the facts of this case. The applicability of the doctrine of estoppel and *res judicata* was an election made by Orchard Circle in the conduct of litigation, which is

peculiar to the case before us. There was no issue of Form D lapsing in our case because the original Form D is still valid even during the second land inquiry.

[84] In the present case, the doctrine of estoppel and *res judicata* was not applied to override s. 8(4) of the LAA as there was no contravention of s. 8(4) of the LAA in the first place because the first award was made within the two-year period.

[85] Hence, the second question framed by Orchard Circle is therefore misconceived. It was never the argument by SILK that the doctrine of estoppel and *res judicata* clothed Form D with legal validity which would otherwise be invalid. It is the conduct of Orchard Circle in not appealing against Hinshawati Shariff J's order which estopped it from raising the issue of Form D/s. 8(4) of the LAA in the second judicial review proceedings. These issues ought to have been raised in the first judicial review application, in which the issues or matter had been decided in finality.

[86] Therefore, we do not see the need to answer the second question as framed, in view of the facts of the case.

Conclusion

[87] To sum up:

(i) for the first question, it does not arise from the facts of the present case and neither does it flow from the decision of the High Court dated 10 December 2010. Form D did not lapse and neither did the High Court Order dated 10 December 2010 quash Form D;

(ii) for the second question, it was never the submission of SILK that estoppel/*res judicata* clothed Form D with legal validity, which would otherwise be invalid. It was the conduct of Orchard Circle in not appealing against Hinshawati Shariff J's order which estopped it from raising the issue of Form D/s. 8(4) of the LAA in the second judicial review proceedings. Those issues ought to have been raised in the first judicial review application, in which the issues or matter had been decided in finality.

Hence, we find no necessity to answer both the questions posed.

[88] Given the aforesaid, we hereby unanimously dismissed the appeal by Orchard Circle with costs of RM25,000 to first and third respondents, RM25,000 to second and fourth respondents and RM50,000 to fifth respondent. The decision of the Court of Appeal is affirmed.